

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY 10 2000

FCC MAIL ROOM

In the matter of:

Petition of the New Jersey Division of
the Ratepayer Advocate for Preemption
of a New Jersey Board of Public Utilities
Order

CC Docket No. 00-49

REPLY COMMENTS
OF THE
NEW JERSEY BOARD OF PUBLIC UTILITIES
IN OPPOSITION TO THE PETITION FOR PREEMPTION

Pursuant to a Public Notice DA 00-677 of the Federal Communications Commission ("Commission"), the New Jersey Board of Public Utilities ("Board") herewith files these Comments in the above-referenced matter in reply to the comments of the Telecommunications Resellers Association ("TRA"), NEXTLINK Communications, Inc. ("Nextlink"), and the National ALEC Association/Prepaid Communications Association ("NALA/PCA"). For the reasons that follow, the Board respectfully requests that the Commission reject these comments and deny the petition of the New Jersey Division of the Ratepayer Advocate ("Advocate"). These comments either expressly or impliedly assume as fact the allegations of the Advocate, all of which are being asserted by the Advocate in two dockets which are pending in the United States District Court for the District of New Jersey, namely, AT&T v. BA-NJ and the New Jersey Board of Public Utilities, Civil Action No. 97-5762 (KSH), and MCI v. BA-NJ and the New Jersey Board of Public Utilities, Civil Action No. 98-0109 (KSH). Because these commenters do not present any independent basis for the granting of the Advocate's petition, because the matter is pending in the United States District Court where the Advocate requested and was granted intervention, and because, as we demonstrate herein and in our earlier Comments, the Advocate's petition is based on unfounded allegations and does not meet the standards for preemption, the petition should be denied.¹

¹ Should the Commission determine that it wishes to consider the merits of the Board's Orders challenged herein by the Advocate, the Board respectfully requests that the FCC take notice of the briefs filed before the United States District Court for the District of New Jersey and permit the Board to supplement these Comments with further arguments.

The comments of the TRA make clear that the TRA relies upon unproven allegations about the Board's policies. The TRA advises the Commission that "[i]t is unclear from the Petition whether the Board's policy is being applied in such a restrictive manner..." TRA Comments at 2. And the TRA concludes its comments by avoiding any request that the Commission grant the Advocate's petition, and instead asks the Commission to issue a declaratory ruling regarding hypothetical actions by state commissions. TRA Comments at 9. The TRA's comments cannot therefore be accepted as support for the petition.

Nextlink's comments also assume as fact the assertions of the Advocate. Relying upon the Advocate's petition, Nextlink begins its comments with a statement that alleges that the Board established permanent rates for interconnection and unbundled network elements "that even the [Board] did not find to be cost-based." Nextlink Comments at 2. To the contrary, the Board has consistently stated in its Generic Proceeding Order and argued before the United States District Court that the generic rates that it determined are cost-based². This issue also remains pending before the District Court.

Finally, NALA/PCA also notes its support for the Advocate's petition, but only "to the extent that the [Board's] Order imposes certain rates and resale discounts on telecommunications carriers as a precondition to the approval of resale and interconnection agreements." NALA/PCA Comments at 1. NALA/PCA assumes that resellers are "forever limited to the 20.03% resale discount mandated by the Board," NALA/PCA Comments at 2, but provides no independent basis for this assumption.

Contrary to these comments and to the allegations of the Advocate, the Board has not precluded carriers from arriving at rates in arbitrations or negotiations which differ from those determined by the Board in the Generic Proceeding. The Board clearly stated this position in its December 11, 1998 brief in Civil Action No. 97-5762 (KSH), wherein it advised the Court the following:

[a]dditionally and contrary to the Advocate's arguments, the Generic Order does not preclude the prospective use of negotiations or arbitrations. . . . [T]he Board, in the Generic Order, made no ruling and issued no directive precluding ILECs and CLECs from prospectively negotiating or arbitrating in an attempt to obtain more favorable terms, subject to approval by the Board under Section 252's standards. . . . [P]rospective arbitrators

² See, for example, the Board's December 11, 1998 brief in Civil Action No. 97-5762 (KSH), wherein, at page 26, the Board states the following: "[c]ontrary to the Advocate's contentions [references to briefs omitted], the Board's action is neither ultra vires nor preempted but rather is fully consistent with the Act's requirement that interconnection and network element rates be based on costs."

will be able to be guided by the Board's analyses set forth in the Generic Order in evaluating the records created before them.

[December 11, 1998 brief of the Board in Civil Action No. 97-5762 (KSH), pp. 29-30].

Thus, contrary to the false premise which underlies the comments of the TRA, Nextlink and NALA/PRA, and contrary to the unfounded contentions of the Advocate, carriers are not prevented by the Board from negotiating or arbitrating rates which differ from the Board's generic rates. Accordingly, the Advocate's petition and the supporting comments of the TRA, Nextlink and NALA/PRA should be flatly rejected. Moreover, as we have previously argued, the Advocate's attempt to have the Board's actions in the Generic Proceeding reviewed by the Commission even while the same issues and arguments are under review by a United States District Court should be rejected.

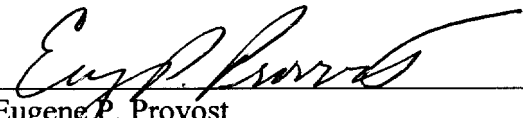
WHEREFORE, for the reasons set forth above and in the Board's April 24, 2000 Comments, the Board respectfully requests that the FCC deny the petition of the Division of the Ratepayer Advocate for preemption.

Respectfully submitted,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Attorney for the New Jersey
Board of Public Utilities

Dated: May 9, 2000

By:


Eugene P. Provost
Deputy Attorney General

JOHN J. FARMER, JR.
Attorney General
Division of Law of New Jersey
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07102
Attorney for the Board of
Public Utilities

RECEIVED
MAY 10 2000
FCC MAIL ROOM

By: Eugene P. Provost
Deputy Attorney General
(973) 648-3709

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

| | | |
|---|---|----------------------|
| In the matter of: |) | |
| |) | |
| Petition of New Jersey Division of |) | CC Docket No. 00-49 |
| the Ratepayer Advocate for Preemption |) | |
| of a New Jersey Board of Public Utilities |) | AFFIDAVIT OF SERVICE |
| Order |) | |

1. I, Audrey Costa, of full age, being sworn according to law, upon her oath deposes
and says:

2. I am employed as a Legal Secretary in the Department of Law and Public Safety,
Division of Law.

3. On May 9, 2000, at the direction of Deputy Attorney General Eugene P. Provost,
I caused a copy of the foregoing comments of the New Jersey Board of Public Utilities in the
above-referenced matter to be sent via United Parcel Service (UPS) Next Day Air Mail, postage
prepaid, to the following:

No. of Copies rec'd 147
List ABCDE

Ms. Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Ms. Janice Miles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., TW-A325
Room 5-C327
Washington, D.C. 20554

Mr. Barry S. Abrams
Vice President, General Counsel & Secretary
Legal Department
Bell Atlantic-New Jersey, Inc.
540 Broad Street, Room 2000
Newark, N.J. 07101

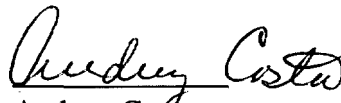
I also caused a copy of the comments to be hand delivered on May 10, 2000 to:

Christopher J. White, Esq.
Division of Ratepayer Advocate
31 Clinton Street, 11th Floor
Newark, N.J. 07101

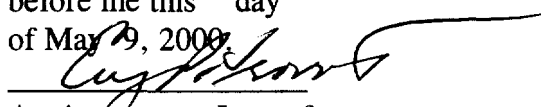
I also caused a copy of the comments to be sent by first class mail to:

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Dated: May 9, 2000


Audrey Costa

Sworn to and subscribed
before me this day
of May 9, 2000


An Attorney-at-Law of
the State of New Jersey